Regulatory/Contractual Update

November 30, 2009 Volume 14, Issue 11

- On November 19, 2009, DoD noticed in the Federal Register that it had "adopted as final, without change, an interim rule amending the DFARS to implement section 847 of the National Defense Authorization Act for Fiscal Year 2008. Section 847 addresses requirements for senior DoD officials to obtain a post-employment ethics opinion before accepting compensation from a DoD contractor within two years after leaving DoD service." And a proposed FAR rule was similarly noticed on November, 13, 2009, "Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions" with comments due on/before January 12, 2010.

  Also, on November 9, 2009, DoD noticed in the Federal Register "a public meeting to establish an initial dialogue with industry and Government agencies about the requirements of section 207 of the Weapon Systems Acquisition Reform Act of 2009 relating to organizational conflicts of interest (OCI)." for December 8, 2009, 1 p.m. to 4 p.m., EST at GSA Auditorium, 1800 F Street, NW., Washington, DC with Point of Contact: Sandra K. Ross, CPIC/DPAP, at 703-695-9774.

  And, it was reported that the Air Force on November 3, 2009, issued a memorandum on OCI and expressed "concern about the number of potential and actual OCIs in government contracting has grown significantly and has been the subject of recent GAO protests. The referenced memorandum provides a fact sheet discussing the three types of OCI (biased ground rules, impaired objectivity, and unequal access to information) and prescribes use of restrictions in OCIs of the first two types in lieu of 'firewalls' and 'non-disclosure agreements'. Further, the memo includes a …training briefing from SAF/GCQ on the subject of OCIs in services contracts that was presented at the Acquisition Law Conference this past June."

- On November 19, 2009, DoD noticed in the Federal Register that it had "adopted as final, without change, an interim rule amending the DFARS to implement section 846 of the National Defense Authorization Act for Fiscal Year 2008 and section 842 of the National Defense Authorization Act for Fiscal Year 2009. These laws address protections for contractor employees who disclose information to Government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DoD contract."

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- On November 20, 2009, the White House issued Executive Order 13520 on the subject of "Reducing Improper Payments." OMB has been tasked to take certain actions within a 90 day timeframe that includes regulatory guidance, etc. and Treasury, Attorney General, and OMB have a 180 day period to accomplish other specified tasks. Agency heads are similarly asked to assist in this endeavor.

- On November 23, 2009, DoD noticed in the Federal Register an "interim rule amending the DFARS to implement section 825 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). Section 825 clarifies the Government's rights in technical data in the designs of DoD vessels, boats, craft, and components thereof. This interim rule also implements the Vessel Hull Design Protection Amendments of 2008 (Pub. L. 110-434)." "This interim rule adds language to the existing technical data policy sections and creates two new clause alternates. 10 U.S.C. 2320 establishes requirements for DoD's acquisition of technical data and neither of the above statutory changes covers computer software. Accordingly, additional coverage in the DFARS for computer software is unnecessary." The rule is effective on November 23, 2009, and comments are due on/before January 22, 2010.

- DoD continues to issue memoranda including the following:
  - November 19, 2009, Class Deviation to the FAR—Small Disadvantaged Business Certification for Subcontractors wherein DoD implements an October 3, 2008 (sic) SBA interim rule which eliminates the need for SBA certification of Small Disadvantage Business status, i.e. prime contractors can rely upon written representations from subcontractors regarding their SDB status.
  - November 16, 2009, In-sourcing Contracted Services—Implementation Guidance Regarding the AbilityOne Program wherein direction is provided that aims on the reduction in the number of contractors with goals for accomplishing same.

    COMMENT: Does this have a ring to, "been there, done that?" Didn't the public/private depot competitions from the 1990s establish the accounting/cost "rules" on fair pricing and allocation of costs or is DoD (continuing) some (bad) practices in this area?
  - November 3, 2009, Contract Property Management Policy whereby DAU will provide, by the end of FY2010, input on property policy changes for incorporation into DFARS, PGI, etc. and then cancellation of DoDI 4161.2.

- AFAC 2009-1030 was issued with "significant changes in this Air Force Acquisition Circular (AFAC) including
  - Inclusion of Designated Acquisition Officials (DAOs)
  - Deletes clearance procedures for IPT Pricing
  - Acquisition Planning Updates in accordance with AFI 63-101
  - Considering Severability when Forming Contracts."

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- On October 27, 2009, OFPP issued a memorandum to the agencies on Increasing Competition and Structuring Contracts for the Best Results with goals/objectives for same.

- On October 29, 2009, OFPP also issued a memorandum requesting civilian agency input toward OFPP's next annual report on Performance-Based Management Systems and on how well agencies are doing in accomplishing, on average, the 90% metric in cost/schedule goals.

- Jack Paul continues to offer his excellent contracting courses—info available at www.JackPaul.com

Comments on items that may be of potential interest in contract negotiation and contract drafting/management—

- A recent article in the ABA Business Law Section "Business Law Today," Nov/Dec 2009, by H. Ward Classen and James M. Sullivan, entitled, "Software Licensing In a Troubled Environment" may be relevant. The article explores the potential risks associated with executory software licenses in a bankruptcy environment and has recommendations on how to structure the software transaction to mitigate the risks in the area. Ecopy at http://www.abanet.org/buslaw/blt/2009-11-12/classen-sullivan.shtml

- And, another timely article by Frederick L. Klein and David Krohn on Letters of Credit is also available on the ABA Business Law Section website and it provides an update on LCs—especially those issued by US Banks that are in/going into Receivership. The title is entitled, "Beneficiaries Beware: Standby Letters of Credit Are Not Bullet Proof!" It provides suggested clauses as well as recommendations on possible courses of action given the dynamics of the banking industry. The article is available at http://www.abanet.org/buslaw/newsletter/0085/materials/pp2.pdf

- An interesting case on the arbitrator's latitude when a party fails to advance deposits as well as highlighting a limitation on the options of the advancing/depositing party to compel payments/deposits. Advocates have to really think about the best strategy...even to assert its own claim! In drafting the ADR clause one should consider the possibility of a party not paying its proportionate obligation which is usually required by the arbitration rules and consider what the parties could do including the alternatives before/after the arbitrator is appointed including the possibility that non-payment may be an election to not engage in arbitration and resort to the courts, etc. for relief. The case is Dealer Computer Servs. Inc. v. Old Colony Motors Inc., No. 09-20049, U.S. 5th Circuit, November 19, 2009, and is available at http://caselaw.lp.findlaw.com/data2/circs/5th/0920049cv0p.pdf

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- Commencing with the May 22, 2008, issue this Update has been reporting on the teaming agreement litigation involving Trianco v. IBM, first at the US District Court, ED Pennsylvania, and its "trips" to/from the 3rd Circuit Court of Appeals. The latest decision, No. 08-4318, was made October 6, 2009, by the 3rd Circuit, and is at http://www.ca3.uscourts.gov/opinarch/084318np.pdf

  Upon reading that latest opinion and the definitive agreement between the parties it could briefly be stated that drafters of teaming agreements should consult those documents and consider having the absence of ambiguity be a key and/or having a methodology on resolving open items in a fair/expedited manner. For example, this author has on his website an article on Negotiation and the benefits of using some form of "Baseball Arbitration" or "Final Offer Arbitration" to resolve relationship issues by negotiation!

Future Speaking Topics Include—

- Seattle South Sound and Puget Sound NCMA Chapters, National Education Seminar, "Risk Management for Complex U.S. Government Contracts and Projects" Registration info: Tami Grant, grantt@wsdot.wa.gov

- International Association for Contract and Commercial Management (IACCM), audio seminar, "Drafting the Ultimate Arbitration Clause."

Current Articles Include—

- **"Conflict Resolution Techniques…The Answer to Legislative Impasses?"** Published in NCMA Contract Management, magazine July 2009. E-copy is available at www.Rumbaugh.net

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